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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 070384

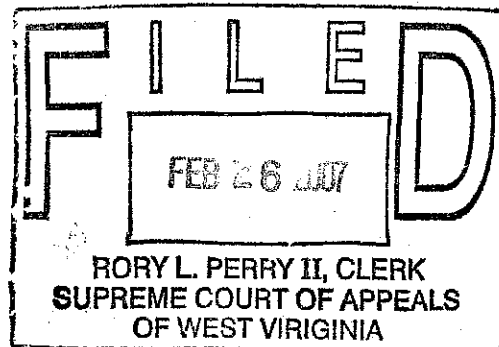
TIG INSURANCE COMPANY,

Petitioner,

vs.

THE HONORABLE ARTHUR M. RECHT,
WILLIAM O. GALLOWAY, GALLOWAY LAW
OFFICES, CAMBRIDGE PROFESSIONAL
LIABILITY SERVICES and JOHN DOES
UNKNOWN, JEFFREY A. HORKULIC,
REBECCA A. HORKULIC, his wife,
and JEFFREY HORKULIC As Natural
Parent and Legal Guardian of
STEPHANIE HORKULIC and
BENJAMIN HORKULIC, minors,

Respondents.



**RESPONSE OF JEFFREY A. HORKULIC,
REBECCA A. HORKULIC, HIS WIFE, AND
JEFFREY HORKULIC, AS NATURAL PARENT
AND LEGAL GUARDIAN OF STEPHANIE
HORKULIC AND BENJAMIN HORKULIC, MINORS,
TO TIG INSURANCE COMPANY'S
PETITION FOR WRIT OF PROHIBITION
AND MEMORANDUM IN SUPPORT THEREOF**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
I. KIND OF PROCEEDING AND NATURE OF RULING BELOW	2
II. STATEMENT OF FACTS	6
III. CORRECTION OF PETITIONER'S STATEMENT OF FACTS	13
IV. ARGUMENT	17
A. THE RIGHT TO AWARD ATTORNEY FEES FOR BREACH OF SETTLEMENT AGREEMENT	18
B. THE AMOUNT OF ATTORNEY FEES	26
V. CONCLUSION	30

TABLE OF AUTHORITIES

Cases

Aetna Casualty & Surety v. Pitrolo, 176 W. Va. 190, 342 S.E.2d 156 (1986).

Arneault v. Arneault, 216 W. Va. 215, 605 S.E.2d 590 (2004).

Barefield v. OPIC Companies, Inc., 215 W. Va. 544, 600 S.E.2d 256 (2004).

Brison v. Kaufman, 213 W. Va. 624, 584 S.E.2d 480 (2003).

Pizarro, M.D., v. Medical Assurance of West Virginia, Inc.; and Colombo & Stuhr, PLLC, Circuit Court of Ohio County, West Virginia, Civil Action No. 00-C-1489.

Sally-Mike Properties v. Yocum, 179 W. Va. 48, 365 S.E.2d 246 (1986).

Sanson v. Brandywine Homes, Inc., 215 W. Va. 307, 599 S.E.2d 730 (2004).

State ex rel. Bronson v. Wilkes, 216 W. Va. 293, 607 S.E.2d 399 (2004).

Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290 (2001).

Rules

W.Va.R.Civ.P. 54(b).

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I.

**Kind of Proceeding
and Nature of Ruling Below**

This is an original proceeding in which the petitioner, TIG Insurance Company, seeks a writ of prohibition to reverse two circuit court orders, both of which were entered on October 4, 2006. One of the orders makes a finding that attorney fees should be granted for a breach of settlement claim and the other order establishes the amount of attorney fees. (The orders are attached to petitioner's petition and marked as "Exhibit A" and "Exhibit B.")

This action originates out of a legal malpractice committed by Attorney William E. Galloway. Attorney Galloway, who represented Jeffrey A. Horkulic and Rebecca A. Horkulic and their children (hereinafter "Horkulics") in a personal injury automobile accident claim, missed the statute of limitations.

Claims for violation of the Unfair Claims Settlement Practices Act [W.Va. Code §33-11-4(9)] were also filed against Attorney Galloway's malpractice carrier, TIG Insurance Company (petitioner herein and hereinafter referred to as "TIG") and Cambridge Professional Liability Services (hereinafter referred

to as "Cambridge"), an administrator of TIG, who is believed to have assisted in the handling of the malpractice claim. The claims against TIG and Cambridge were bifurcated and stayed until after resolution of the underlying legal malpractice claim.

Following development of the underlying legal malpractice claim, including discovery, designation of experts and witnesses and scheduling of a trial date, Galloway's attorney, William D. Wilmoth, approached Horkulics' attorney, Robert P. Fitzsimmons, to discuss a possible resolution of the underlying legal malpractice claim. Galloway's attorney and Horkulics' attorney entered into a settlement agreement in May, 2005, which contained multiple features, two of which are material to the Petition for Writ of Prohibition, namely:

(1) Galloway's malpractice carrier, TIG, would pay the full policy limits of Five Hundred Thousand Dollars (\$500,000.00) in exchange for a full and complete release of Galloway from personal liability; and

(2) Galloway would confess judgment, admitting liability and damages totaling One Million Five Hundred Thousand Dollars (\$1,500,000.00) (hereinafter referred to as "confessed judgment").

After numerous conversations and letters in furtherance of the settlement agreement, Horkulics filed a Motion to Compel Enforcement of Compromise Settlement Agreement on August 10, 2005. A supplement to the Motion to Compel Enforcement of Compromise Settlement Agreement was filed by Horkulics on November 4, 2005.

According to the testimony of Wilmoth, TIG agreed to the settlement proposal with the understanding that they could file an objection to the confessed judgment. Several months passed when a conference call was initiated by TIG's three attorneys on August 18, 2005, with Galloway's attorney, Wilmoth, and Horkulics' attorney was later added to the call. (Finding of Fact 18, Order entered August 25, 2006.) According to Galloway's attorney, the settlement agreement, including the confessed judgment feature, was reaffirmed. The settlement was confirmed by letters between Horkulics' and Galloway's attorneys. (Finding of Fact 20, Order of August 25, 2005, Exhibits 5, 9, 16.) (All references to exhibits are those exhibits introduced at the May 30, 2006, hearing.)

A hearing on the motion to compel was held in the circuit court before the Honorable Arthur M. Recht, on May 30, 2006.

Attorney William Wilmoth was the only witness called by the parties. Horkulics also introduced 17 exhibits which were admitted into evidence. Galloway's attorney did not present any witnesses at the hearing.

By Order entered August 25, 2006, the circuit court ordered that Horkulics' Motion to Compel Enforcement of Settlement Agreement be granted and further ordered that a petition requesting attorney fees could be filed. The order enforcing the settlement agreement was entered pursuant to West Virginia Rule of Civil Procedure 54(b) and is presently the subject of a Petition for Appeal before this Honorable Court in a case styled Jeffrey A. Horkulic, et al., v. William E. Galloway, et al., Case No. 070080.

Horkulics filed their Motion for Attorney Fees on July 5, 2006, and a Supplemental Motion for Attorney Fees on August 22, 2006. By Order entered October 4, 2006, the circuit court granted Horkulics' Motion for Attorney Fees. ("Exhibit A" to TIG's Petition for Writ of Prohibition.) By separate order also entered October 4, 2006, the circuit court granted attorney fees to Horkulics' counsel for one hundred one and five-tenths (101.5) hours and set the rate of Five Hundred Dollars (\$500.00) per hour for a total award of Fifty Thousand

Seven Hundred Fifty Dollars (\$50,750.00) plus expenses in the amount of Fifty-Four Dollars (\$54.00). ("Exhibit B" to TIG's Petition for Writ of Prohibition.) The circuit court did not grant attorney fees for the time expended by Robert P. Fitzsimmons' co-counsel, and the Court reasoned that this was done in "...an attempt to achieve a fair resolution of this issue." (See Footnote 2, Order of October 4, 2006, "Exhibit B" of petitioner's memorandum.)

II.

Statement of Facts

In May of 2005, counsel for Galloway and Horkulics entered into a settlement agreement for the legal malpractice claims. [Page 30, May 30, 2006, Transcript (hereinafter "T").] The settlement agreement provided for a confessed judgment of \$1.5 million and TIG could file an objection in court. (T. 38, 35.) Galloway's insurance company, TIG, agreed to the settlement. (T. 31, 32, 33, 37; Exhibit 2.) Defendant Galloway was on board with the settlement. (T. 33/10; 35/10.) Galloway's attorney's notes confirm the settlement. (T. 52.) A couple of weeks later, TIG had a bout of post-settlement afterthought and started "raising noises" and "noting objections." (T. 39, 55.)

On May 20, 2005, Galloway told his attorney he consented to the settlement, including the confessed judgment. (T. 56, 111/10.) On August 18, 2005, TIG's team of attorneys, Flaherty, Zerman and Ruberry, contacted Attorney Wilmoth and discussed the settlement and then added Horkulics' counsel to the call. (T. 58.) Horkulics and Galloway through their counsel reaffirmed the settlement, including the confessed judgment which was blessed by the TIG representatives. (T. 61.) Horkulics' counsel's letter of September 1, 2005, and Galloway's reply letter of September 29, 2005 (Exhibits 5, 9), reaffirmed the agreement, including the confessed judgment. (T. 63, 68.) The confirmation letter from Galloway's attorney (Exhibit 9) was copied to TIG's representative and Galloway's personal counsel, Attorney Cuomo. (T. 68.) No objection was filed by Galloway's personal counsel. On August 25, 2005, TIG sent a reservation of rights letter to Galloway. (T. 114, 76.)

The record demonstrates that Horkulics' Motion to Compel Enforcement of Settlement Agreement (the "motion") involved two parties, the plaintiffs, Horkulics, and the defendant, Galloway. The motion was between only those two parties. As in many cases, there is a liability insurer involved in providing direction and guidance to the individual insured's attorney, as was in this case.

Keeping in mind that the only witness to testify in reference to the Motion to Compel Enforcement of Settlement Agreement was William Wilmoth and the only exhibits introduced as evidence were the 17 exhibits introduced by Horkulics' counsel at the May 30, 2006, hearing, it is clear that the court's order granting the motion to compel was correct.

William Wilmoth is one of the most respected attorneys in the State of West Virginia, having been an attorney since 1975 and generally handling cases involving professional negligence and complex litigation. (T. 23.) Mr. Wilmoth's practice involves approximately 90 percent defense work and 10 percent plaintiffs' work. He is regularly employed by insurance companies to represent their insureds and was the principal counsel for Attorney William Galloway, the defendant in the legal malpractice case. (T. 79, 24.) The claims against TIG and its administrator alleging violation of the Unfair Claims Settlement Practices Act had been bifurcated and stayed and therefore TIG was not a party to the underlying legal malpractice case. (T. 25.) Attorney Wilmoth had been given the authority to speak on behalf of the insured and his client, William Galloway, at all times relevant to this proceeding.

(T. 29.) Mr. Wilmoth never had any question that he could bind Mr. Galloway in a settlement. (T. 29.)

In May of 2005, TIG directed Wilmoth to begin settlement negotiations. (T. 26.) Attorney Wilmoth met with Horkulics' counsel and they discussed two potential alternative settlements. After discussing these alternatives, Mr. Wilmoth called TIG's agent, Rapponotti, who is also an attorney, and Mr. Rapponotti gave Attorney Wilmoth the authority to enter into a full settlement on the legal malpractice claim. (T. 31.)

The settlement agreement had multiple features, including payment of the policy limits of \$500,000.¹ In addition to the policy limits payment, Defendant Galloway was to agree to a confessed judgment on liability and damages which total \$1.5 million. (T. 30.) Horkulics' counsel originally wanted the insurance company to sign off and agree to the confessed judgment; however, it was ultimately agreed that the confessed judgment would be filed in court by Galloway and TIG could file its objections. This provision was specifically agreed to in a conversation between Attorney Wilmoth and TIG's representative

¹ It was originally believed that the policy limits of \$500,000 would be decreased by attorney fees and therefore the representatives of Horkulics and Galloway agreed to \$450,000 as the policy limits; however, it was later discovered that this was not a decreasing limit policy and \$500,000 became the agreed upon figure. (T. 27, 28.)

and attorney, Rapponotti. (T. 31/9.) Attorney Wilmoth was adamant that there was no question that Mr. Rapponotti on behalf of TIG fully agreed to the settlement, specifically including Galloway's confessed judgment and TIG's right to then file an objection in court. Attorney Wilmoth then called Galloway who indicated that he was "on board" with the settlement. (T. 33, 35.) Wilmoth then sent an e-mail to Attorney Rapponotti outlining the general parameters of the agreement, which included, "Plaintiffs will file a 'Motion for Entry of Consent Judgment.' to which Mr. Galloway will agree (to protect his assets)." (Exhibit 2, T. 38.) Again, Mr. Wilmoth testified that the consent judgment of liability and damages was part of the settlement agreement. (T. 38.) As a further part of the May 24, 2005, e-mail, Attorney Wilmoth indicated that he was preparing the settlement agreement. (T. 39/21, 40.) Attorney Wilmoth then received multiple inquiries from Horkulics' counsel requesting copies of the proposed settlement documents. (T. 41.) Attorney Wilmoth testified that TIG then began "raising noises" and "noting objection" after the settlement agreement. (T. 39, 55.) Despite these noises, Mr. Galloway specifically told Attorney Wilmoth that he consented to the entire settlement and this was to be communicated to Horkulics' counsel, which it was. (T. 56.) Attorney Wilmoth testified that this confessed judgment feature

specifically included Mr. Galloway's admission to liability and damages of \$1.5 million. (T. 56/23.)

On August 18, 2005, TIG's team of attorneys, Beth Berger Zerman, Ed Ruberry and Thomas Flaherty, contacted Mr. Wilmoth to discuss the settlement. (T. 58.) Horkulics' attorney was later joined in the conference call, and Mr. Wilmoth testified that it was again agreed that Mr. Galloway would file a confessed judgment of liability and damages of \$1.5 million and that TIG could then file its objection. (T. 61.) Specifically, Attorney Wilmoth testified that all participants in the telephone conversation [which included three TIG attorneys] agreed to the confessed judgment and the reaffirmed settlement. (T. 61.) TIG's agreement to the settlement was also confirmed by Attorney Wilmoth in a note contained within his file and admitted as part of Exhibit 17 at the hearing.

Horkulics' counsel wrote to Wilmoth confirming the agreement by letter dated September 1, 2005. (Exhibit 5.) Mr. Wilmoth responded to that letter by his letter of September 29, 2005, indicating that there was, in fact, an agreement consistent with the terms set forth in Horkulics' counsel's letter of September 1, 2005. (Exhibit 9.) Mr. Wilmoth further testified that there was no misunderstanding as to the

agreement. (T. 66/3.) Once again, multiple letters were written between counsel for Horkulics and Galloway requesting settlement information and/or the ability to review the proposed settlement documents. In these letters, Attorney Wilmoth represents that he's working to put the settlement documents and/or release together and to obtain additional information in furtherance of the settlement agreement. (See, e.g., Exhibits 12, 13, 14, 15.)

On December 20, 2005, Attorney Wilmoth wrote a letter following a circuit court hearing and the filing of the Motion to Compel Enforcement of Compromise Settlement Agreement. In that letter (Exhibit 16), Mr. Wilmoth once again admitted, "Though no one ever asked me directly, I believe that we had a settlement." Mr. Wilmoth was the only witness who testified at the hearing on the Motion to Compel Enforcement of Settlement Agreement and the only exhibits filed with the court in reference to this motion were the plaintiffs' 17 exhibits. Exhibit 17 contained Mr. Wilmoth's file relating to settlement discussions. Galloway did not present any witnesses at the hearing.

III.

Correction of Petitioner's Statement of Facts

The circuit court scheduled a hearing on May 30, 2006, where all evidence was presented in reference to the motion to compel enforcement. Attorney William Wilmoth, who was retained to represent William Galloway, was the only witness who testified under oath in support of Horkulics' Motion to Compel Enforcement of Compromise Settlement Agreement. Seventeen exhibits were introduced into evidence in support of Horkulics' motion to compel. Defendant Galloway did not call any witnesses nor introduce any exhibits at the hearing.

The evidence to be considered in determining the motion to compel was limited to that evidence introduced at the hearing on May 30, 2006. Petitioner repeatedly goes outside the record in its petition. (See, for example, petitioner's memorandum, page 2, Footnote 1, citing Hearing Transcript of December 9, 2005; petitioner's memorandum, page 5, Footnote 3, citing Hearing Transcript of December 19, 2005; Mr. Flaherty's statements in the hearing of December 9, 2005, petitioner's memorandum, page 7, and Judge Recht's comments at the December 9, 2005, hearing, made five months before the hearing on the motion to compel and the presentation of evidence therein; and

petitioner's memorandum, page 9, citing statements made at the March 29, 2006, hearing.)

In the second paragraph of Footnote 1, page 2 of petitioner's memorandum, petitioner's counsel indicates that the only reason for the insistence of the consent judgment was to "set the value" of their "bad faith" claim and cited the December 9, 2005, hearing transcript, pages 47-48. The quoted phrases "set the value" and "bad faith" do not appear on the pages cited. Horkulics' insistence on the confessed judgment was to attempt to avoid proof in a later trial of the amount of damages in the underlying claim and not to set the value for the bad faith claim.

Petitioner cleverly quotes Judge Recht's comment from the December 9, 2005, hearing indicating that there are serious issues as to whether there was a meeting of the minds. (Memorandum, p. 9.) Not surprisingly, petitioner did not note that those statements were made long before the court heard Attorney Wilmoth's testimony and had reviewed the September 1, 2005, September 29, 2005, and December 20, 2005, letters confirming the settlement between counsel for Horkulics and Galloway. (Exhibits 5, 9, 16.)

Petitioner asserts that "Mr. Fitzsimmons suggested an award of attorney fees in the range of Five Hundred Dollars (\$500) to Eight Hundred (\$800) per hour." (Petitioner's memorandum, p. 17.) As is clear from a review of both motions and the Affidavit of Robert P. Fitzsimmons, no fee was ever suggested and the matter was left solely to the discretion of the circuit court. Further, on page 17 of petitioner's memorandum, they suggest that Robert P. Fitzsimmons submitted an affidavit raising "his original attorney fee" from Five Hundred Dollars (\$500.00) to Eight Hundred Dollars (\$800.00) to One Thousand Dollars ((\$1,000.00) per hour. Such characterization is untrue. The motions and affidavit merely provided other attorney fee awards in the State of West Virginia, which is one of the requirements in prosecuting a motion for attorney fees. Aetna Casualty & Surety v. Pitrolo, 176 W. Va. 190, 342 S.E.2d 156. (1986).

On page 18 of the memorandum, petitioner asserts that from the initial filing of the request for attorney fees, Attorney Fitzsimmons "interspersed" an additional 31.25 hours of reconstructed time. This is not accurate. The amended time records did three things:

(1) Approximately five hours were deleted for time expended prior to August 18, 2005, the date the circuit court found that there was definitely a settlement;

(2) The time records were updated to include hours expended from the time of the initial filing through the hearing and granting of the motion for attorney fees; and

(3) As indicated in the affidavit, the records reflected the time actually recorded and the reconstruction was done in order to insure the utmost accuracy of the actual time expended.

No time was recorded which was not verified by time records or actual work product.

Petitioner's memorandum at pages 28 and 29, Footnote 14, alleges that the 101.75 hours represent some work performed prior to August 19, 2005. Keeping in mind that the settlement found by the court occurred at the latest on August 18, 2005, that date was utilized for computation of the hours, and as reflected in the Supplemental Motion for Attorney Fees, no time entries appear before August 18, 2005, which comprise the 101.75 hours.

Petitioner asserts on page 31, Footnote 16, that based upon time sheets submitted by Mr. Fitzsimmons that there was a contingency fee or, in the alternative, a \$150 per hour charge. Although no evidence was submitted or cited by petitioner because there is none, your author has reviewed the contingency fee contract of February 7, 2002, and such assertion is not true.

As is otherwise set forth herein, respondents disagree with many of the opinions and all of the arguments made by petitioner.

IV.

Argument

Without doubt, a settlement was reached between Horkulics and Galloway and clearly should be enforceable as was ordered by the circuit court. Although TIG is now raising issues which more appropriately are between them and their insured, nonetheless a fair amount of the testimony involved Galloway's insurance company's actions.

The facts overwhelmingly indicate that the insurance company fully consented to the terms of the settlement, including the filing of the confessed judgment on liability and damages of \$1.5 million and the insurance company through Wilmoth reserved unto itself the right to file an objection to the confessed judgment. It is also clear that after a proper settlement had been entered into protecting TIG's insured, Attorney Galloway, and providing some relief to the injured victims of a negligent car accident, and now legal malpractice, the insurance company "got cold feet." TIG decided they didn't like the deal and the best way to escape their responsibility was to go after its own insured, Mr. Galloway, by having one of its three attorneys send a reservation of rights letter from its Chicago law firm and copying Attorney Wilmoth. Interestingly, the reservation of rights letter was not sent until three months after the settlement agreement was entered into in May of 2005 and seven days after the reaffirmation of this same agreement by TIG's attorneys.

A.

**THE RIGHT TO AWARD ATTORNEY FEES
FOR BREACH OF SETTLEMENT AGREEMENT**

The circuit court's Order of August 25, 2006, in detailed fashion found that the Horkulics and Defendant Galloway had

entered into a settlement agreement. The court ordered that this agreement be consummated, which included multiple features, such as the payment of the policy limits of Five Hundred Thousand Dollars (\$500,000.00) and Defendant Galloway's confession of judgment on liability and damages of One Million Five Hundred Thousand Dollars (\$1,500,000.00).

The Motion to Compel Enforcement of Settlement Agreement was solely and exclusively between Horkulics and Galloway and did not include any agreement with Galloway's insurance carrier, TIG. Nonetheless, TIG was Galloway's liability insurance carrier, and as this Court and most courts throughout this country have recognized, there is a tripartite relationship that exists when an attorney is hired by an insurance company to represent its insured. See concurring opinion of Justice Davis, State ex rel. Brison v. Kaufman, 213 W. Va. 624, 584 S.E.2d 480 (2003); Barefield v. OPIC Companies, Inc., 215 W. Va. 544, 600 S.E.2d 256 (2004) (attorney not agent of insurer in a tort claim). Irrespective of such relationship, the agreement was only between Horkulics and Galloway.

At the May 30, 2006, hearing, Judge Recht recognized that Mr. Joseph Selep (who was the fourth attorney employed by TIG

in this proceeding to represent Defendant Galloway) was in such a tripartite position. The circuit court permitted TIG's attorneys to object during the proceeding, which right they did, in fact, exercise. Judge Recht further allowed TIG's attorneys to represent any witnesses who would be called and who were employed by TIG.

The only witness called at the hearing on the Motion to Compel Enforcement of Settlement Agreement was Defendant Galloway's attorney, William Wilmoth, who had represented the interest of Mr. Galloway throughout the material settlement negotiations and had been communicating those negotiations to Galloway's insurance carrier, TIG.

It is interesting to note that TIG requested the right to participate actively in the hearing, which would obviously include cross-examination and calling of their own witnesses despite the motion being solely and exclusively between the Horkulics and Galloway. Not surprisingly, TIG wants the best of both worlds. They allege that they should participate and have such rights even though all of the claims against TIG in this case had been bifurcated and stayed by previous order. TIG had no better right to participate in this hearing than any other insurance carrier involved in a liability claim.

TIG takes the position that if they can muddy up the waters, then they want to participate, but if it means there potentially may be some adverse consequences, then they deny that they were a party to the settlement agreement. Although TIG wants the full rights of a party in this proceeding, their participation and all claims against them had been bifurcated and stayed pursuant to their own motion. Interestingly, TIG now agrees that it was "a stranger to the settlement contract as a bifurcated third-party bad faith defendant." (See petitioner's memorandum, p. 17.) TIG further attempts to distance themselves from the settlement agreement by alleging, "a settlement contract to which TIG was a stranger inasmuch as the settlement related solely to plaintiffs' claims against Mr. Galloway and did not resolve or even address plaintiffs' claims against TIG." (Petitioner's memorandum, p. 20.) Once again, in an effort to avoid involvement when convenient, TIG alleges, "It is uncontested that TIG was not a party to the settlement contract between plaintiffs and Mr. Galloway." (Memorandum, p. 24.)

Despite TIG's conveniently alleged excuses, one cannot escape the true realities of the world of litigation, namely, the tripartite relationship between counsel, his or her client,

the insured, and the insurance company. Such relationship was designed to protect communications among three differing parties whose interests are not always the same. Never has it been advanced that the creation of such a relationship was created to somehow gain an advantage in litigation by having multiple attorneys present evidence and/or cross-examine and/or arguments to a court in a claim involving the two party litigants, one of which is the insured.

This Court has before it the detailed Findings of Fact entered by the circuit court and describing the actions of TIG which attempted to sabotage the settlement agreement between Horkulics and its insured, Galloway. Without recounting the actions and interference by TIG and their refusal to now honor their agreement, Judge Recht in Footnote 1 of the October 4, 2006, Order found that:

"...this Court has no hesitancy in finding that the CONDUCT OF TIG in DELAYING the implementation of an agreed settlement for NEARLY ONE YEAR IS NOTHING OTHER THAN OPPRESSIVE." [Emphasis supplied.]

As the testimony of Attorney Wilmoth indicates, TIG repeatedly reneged on their authorization and later affirmation of settlement and specifically attempted to exert pressure upon Galloway by alleging that he may have personal exposure in

order to eliminate what they must have later felt was an unfavorable settlement agreement. These actions by TIG delayed the settlement benefits for more than a year to individuals who had been victims of a negligently inflicted personal injury compounded by Mr. Galloway's legal malpractice.

The right to award attorney fees in a case involving a breached settlement agreement has been recently addressed by this Court in both Sanson v. Brandywine Homes, Inc., 215 W. Va. 307, 599 S.E.2d 730 (2004), and in State ex rel. Bronson v. Wilkes, 216 W. Va. 293, 607 S.E.2d 399 (2004).

In Sanson, plaintiffs and defendants, as in this case, entered into a settlement agreement by and through their attorneys. After the agreement was reached, the plaintiffs alleged that they had not given their attorney authority to settle. After a full hearing, the circuit court found that the agreement should be enforced and awarded attorney fees and costs. This Court stated in approving the award of attorney fees for breach of the settlement agreement that:

"Having determined that a valid settlement agreement was made, we do not believe the circuit court abused its discretion by ordering the Sansons to pay Skyline's attorney fees and costs incurred to enforce the settlement."

The facts in Sanson are similar to those in the case at bar. This court further recognized that there is authority to award to a prevailing litigant his or her reasonable attorney fees "when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. Pt. 3, Sally-Mike Properties v. Yocum, 179 W. Va. 48, 365 S.E.2d 246 (1986).

In reaching its decision in Sanson, this court noted that the defendants fully performed their obligations by tendering the settlement check and release. Three months later, the Sansons returned the check and the defendants were then forced to file a motion to enforce the settlement agreement. The court approved the circuit court's finding that the defendant "should not have to bear the financial burden caused by the [plaintiffs'] attempt to rescind a valid and enforceable settlement agreement. We agree." Id., at 215 W. Va. 313, 599 S.E.2d at 736.

In State ex rel. Bronson v. Wilkes, *supra*, this Court reaffirmed its finding in Sanson:

"Recently, in Sanson v. Brandywine Homes, Inc.,..., this Court upheld an award of attorney fees and costs which, as in the case at bar, was granted in connection with a motion to enforce a settlement agreement."

The circuit court's Order of October 4, 2006, noted that pursuant to Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290 (2001), the *per curium* opinion of Sanson does, in fact, have precedential value. The circuit court Order found that any time a settlement agreement is breached, the non-breaching party should not have to bear the financial burden caused by another party's attempt to rescind or invalidate an enforceable settlement agreement. The circuit court further found that the operative language of "oppressive conduct" existed in this case thereby justifying on a second basis the award of attorney fees.

In the case at bar, TIG, the insurer, was solely and exclusively responsible for breaching the settlement agreement and causing the Horkulics to file a motion to compel and further prosecuting said motion through a full hearing, and therefore the circuit court's order awarding attorney fees was proper.

B.

THE AMOUNT OF ATTORNEY FEES

The circuit court only awarded attorney fees for the time spent by Robert P. Fitzsimmons in representing the Horkulics and did not grant attorney fees for the significant time spent by the Horkulics' other two counsel, Dean G. Makricostas and Daniel N. Dittmar, in order to avoid any duplicative charges and to attempt to achieve a fair resolution on this issue. (See Footnote 2 of the Order entered October 4, 2006, Exhibit B to petitioner's memorandum.)

Petitioner appears critical of the time recordation of Mr. Fitzsimmons of 101.75 hours. At no time do they allege or produce any evidence indicating that such time in and of itself would be unreasonable for the time spent in prosecuting the motion to enforce settlement which included multiple letters, conversations, motions, briefs, research and a full evidentiary hearing. As indicated from the Affidavit of Robert P. Fitzsimmons attached to the Supplemental Motion for Attorney Fees, Petitioner's Exhibit 2, the time records totaling 101.75 hours are a summary of the actual time "I expended from August 18, 2005, to the present for the prosecution of plaintiffs' Motion for Enforcement of Compromise Agreement and Attorney

Fees." The affidavit further indicates that the time records were recorded both at the time the work was performed and later reconstructed from a review of the actual work performed as reflected in the files of plaintiffs' counsel." The reconstruction does not equate to changes but rather to a verification and correction in the timekeeping records to insure absolute accuracy. As can be seen from a comparison of the two time records, the first of which was submitted many months before the supplemental motion, there was an addition of time because additional work was performed after the original motion had been filed in July of 2006. The Supplemental Motion for Attorney Fees was filed August 22, 2006, three days before the entry of the Order granting the motion to compel enforcement. In addition, the supplemental time records deleted time entries prior to August 18, 2005, based upon the court's finding that at the latest the settlement agreement was entered into on August 18, 2005. Many hours expended after the May, 2005, settlement were not included. As reflected in the Affidavit of Robert P. Fitzsimmons, the 101.75 hours were, in fact, expended in the prosecution of the motion.

Despite petitioner's assertion, Horkulics' counsel never asserted that he was entitled to attorney fees in the amounts of \$500, \$800 or \$1,000 per hour. (See Motion for Attorney

Fees and Supplemental Motion for Attorney Fees.) Horkulics' counsel merely put forth those facts, including affidavits of other practitioners and court orders, demonstrating other hourly rates awarded by courts in the Northern Panhandle and the Pitrolo factors.

In an order entered in the case of Pizarro, M.D., v. Medical Assurance of West Virginia, Inc., and Colombo & Stuhr, PLLC, Civil Action No. 00-C-1489, Judge Gaughan awarded Attorney Patrick Cassidy \$800 per hour for a total of \$871,000. Said order was attached as Exhibit 3 to plaintiffs' Supplemental Motion for Attorney Fees. In Pizarro, attorneys had obtained coverage for their client, Dr. Pizarro, who had been a defendant in a medical malpractice case where there was an excess verdict. Plaintiffs in the malpractice case eventually settled with the insurance carrier so as not to expose this defendant doctor to personal liability; however, the doctor sued the insurance company seeking coverage in order to protect her assets.

Recently this Court in the case of Arneault v. Arneault, 216 W. Va. 215, 605 S.E.2d 590 (2004), remanded the case to the Family Court with directions to immediately award attorney fees of \$241,034.42 to pay the appellant's outstanding attorney

fees. This Court's reversal and remand reversed the order of Judge Recht which had affirmed the Family Court's previous rulings. As the record will reflect, this Court had previously ordered those attorney fees be paid at the rate of \$500 per hour for Attorney Richard Neely without any hearing being allowed to even question the time or rate. A representation of a portion of the bill is attached hereto as Exhibit 1(a) demonstrating the attorney fee rate of Five Hundred Dollars (\$500.00) per hour.

Petitioner alleges that some of the attorney's time would have been spent on the release if the settlement had been properly consummated; however, they provide no proof as to what amount of time they contend would have been spent. As this Court knows from its own practices, defense counsel typically prepare all of the settlement documents and a *de minimis* amount of time would have been spent had the settlement agreement not been breached.

V.**Conclusion**

The circuit court properly ordered the granting of attorney fees in that the defendants had breached the settlement agreement and caused a delay well in excess of one year. It also is clear that the culprit responsible for the breach was TIG. The respondents, Horkulics, properly filed a Motion for Attorney Fees, and the circuit court properly granted the motion for attorney fees because of the breach and further because defendant's conduct was found to be "oppressive." Horkulics' counsel properly documented 101.75 hours in the prosecution of the Motion to Compel Enforcement of Compromise Settlement Agreement. The circuit court properly awarded attorney fees at a rate consistent with the attorney fees ordered by this Court in a recent opinion (Arneault) in 2004 and considerably less than that ordered in other proceedings in the State of West Virginia, specifically including Pizarro v. Medical Assurance, *supra*.

Wherefore, your respondents, Horkulics, respectfully request that TIG's Petition for Writ or Prohibition be denied and that a rule not issue and for such further relief as the Court deems just and proper.

Respectfully submitted,

**JEFFREY A. HORKULIC, REBECCA
A. HORKULIC, His Wife, and
JEFFREY HORKULIC As Natural
Parent and Legal Guardian of
STEPHANIE HORKULIC and
BENJAMIN HORKULIC, MINORS**

By: 

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CERTIFICATE OF SERVICE

Service of the foregoing RESPONSE OF JEFFREY A. HORKULIC, REBECCA A. HORKULIC, HIS WIFE, AND JEFFREY HORKULIC, AS NATURAL PARENT AND LEGAL GUARDIAN OF STEPHANIE HORKULIC AND BENJAMIN HORKULIC, MINORS, TO TIG INSURANCE COMPANY'S PETITION FOR WRIT OF PROHIBITION AND MEMORANDUM IN SUPPORT THEREOF was made upon the parties to this action by mailing a true copy thereof by United States mail, postage prepaid, to their respective attorneys on the 26th day of February, 2007, as follows:

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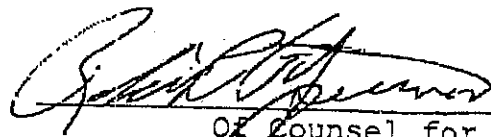
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